

STATE OF MICHIGAN
COURT OF APPEALS

ROBYN CHAMBERS,

Plaintiff-Appellee,

v

TRETTCO, INC., d/b/a HDS,

Defendant-Appellee,

and

ADP, INC.,

Defendant

FOR PUBLICATION

February 16, 2001

9:05 a.m.

No. 202151

Washtenaw Circuit Court

LC No. 96-002654-NZ

ON REMAND

Updated Copy

March 30, 2001

Before: Jansen, P.J., and Markey and O'Connell, JJ.

JANSEN, P.J. (*dissenting*).

I respectfully dissent and would again affirm the jury's verdict. This is a sexual harassment case in which plaintiff, a cook for defendant, was sexually harassed by Paul Wolshon, a floating supervisor, while he was supervising at defendant's facility in Ann Arbor in July 1995. Following a jury trial, the jury specially found that Wolshon sexually assaulted or molested plaintiff through the use of his supervisory powers and that defendant failed to take prompt remedial action after it knew or should have known that plaintiff had been sexually harassed. The jury awarded damages totaling \$150,000.

This Court initially affirmed,¹ with Judge O'Connell dissenting, and the Supreme Court, 463 Mich 297; 614 NW2d 910 (2000), vacated our decision, which had applied the United States Supreme Court's rulings in *Burlington Industries, Inc v Ellerth*, 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998), and *Faragher v Boca Raton*, 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998), both concerning an employer's vicarious liability in a sexual harassment case brought under title VII of the federal Civil Rights Act.² Our Supreme Court, in ordering the matter remanded to this Court decided that application of *Ellerth* and *Faragher* was erroneous and that an employer's vicarious liability in cases brought under the Michigan Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, must instead be analyzed under *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993).³

According to our Supreme Court, the "central question to be addressed on remand is whether plaintiff presented sufficient evidence to demonstrate that defendant 'failed to rectify a problem after adequate notice.'" *Chambers, supra*, 463 Mich 318-319, quoting *Radtke, supra* at 395. The Court further stated that "notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring." *Id.* at 319. With regard to rectifying the problem, the Court stated that "the relevant inquiry concerning the adequacy of the employer's remedial action is whether the action reasonably served to prevent future harassment of the plaintiff." *Id.*

The issue of vicarious liability was preserved by defendant when it moved for a directed verdict at the close of plaintiff's proofs. A trial court's ruling on a motion for a directed verdict is reviewed de novo. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401

(1997). When reviewing a motion for a directed verdict, the evidence and all reasonable inferences from that evidence are reviewed in a light most favorable to the nonmoving party. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998). Directed verdicts are appropriate only when no factual question exists on which reasonable minds could differ. *Brisboy v Fibreboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988).

As found in our previous opinion, I believe that, taken in a light most favorable to plaintiff, there was sufficient evidence presented at trial for the jury to conclude that defendant failed to take prompt remedial action after it knew or should have known that plaintiff had been sexually harassed. The evidence adduced at trial shows that plaintiff began working for defendant in June 1995 for \$7.50 an hour as a cook. Plaintiff was assigned to work at ADP, Inc., while the previous cook was on medical leave. Plaintiff's regular supervisor was Jennifer Hostutler, who went on vacation for the week of July 5 to 8, 1995. During that week, Hostutler was replaced by Paul Wolson, an employee of defendant and a floating supervisor. Upon becoming the acting supervisor, Wolshon immediately began sexually harassing plaintiff. Wolshon's conduct was described in detail by plaintiff and her co-worker, Russell Cade, a dishwasher and preparatory cook.

Plaintiff testified that she spoke with Kevin McLaughlin, the regional director of operations, on the telephone, she believed on Wednesday, July 6. McLaughlin had called the facility, and plaintiff admitted at trial that, while on the telephone, she was being evasive with him. According to plaintiff, McLaughlin asked her, "There's something wrong, isn't there?" She stated that there was and he further inquired if she could tell him. She stated that she could not and McLaughlin said, "I'll be in there to talk to you." Plaintiff testified that she did not tell

McLaughlin of Wolshon's behavior because Wolshon was standing directly in front of her during this telephone conversation. In fact, plaintiff testified that Wolshon was constantly in the kitchen area during the week he supervised at the ADP facility, and this was confirmed by Cade. Although McLaughlin told plaintiff that he would be in later that week, plaintiff stated that he did not show up and talk to her that week.

When Hostutler returned to her supervisory position after her vacation on the following Monday, plaintiff immediately reported Wolshon's conduct to her. Hostutler asked plaintiff to put her complaint in writing, which plaintiff did. After McLaughlin received the written complaint from Hostutler, he had a meeting with plaintiff and Hostutler and told plaintiff that he would further investigate the matter. He also asked plaintiff not to speak to anyone else about the situation. According to plaintiff, after this meeting with McLaughlin and Hostutler, no one from defendant ever again spoke to her about any investigation or the incidents concerning Wolshon. With regard to Wolshon, there was some indication that he was supposed to go to the ADP facility on the day that plaintiff made her written complaint, but that Hostutler "turned him around" and told him to go see McLaughlin. Apparently, Wolshon was, in any event, scheduled to act as a supervisor in Chicago that week following his stay at ADP in Ann Arbor. Defendant should not be able to escape liability because of the fortuitous circumstance that Wolshon is a floating supervisor who was scheduled to be at the ADP facility for only one week and then act as a supervisor in another city. The jury could conclude that defendant had adequate notice on the basis of plaintiff's testimony that she talked on the telephone with McLaughlin and McLaughlin did not thereafter talk to her the week that Wolshon acted as her supervisor, despite stating that he would and knowing that something was wrong, and on the basis of the fact that

plaintiff told Hostutler of Wolshon's conduct the immediate Monday after Wolshon left. Further, the jury could conclude on the basis of plaintiff's testimony that she was never informed of any investigation that defendant did not take adequate remedial action to prevent Wolshon from sexually harassing plaintiff.

With regard to defendant's antiharassment policy, plaintiff testified that she did not remember receiving any employment handbook, that she did not remember signing a statement stating that she had read the handbook, and that she was not aware that defendant had an antiharassment policy. The policy required employees to contact George Cousins, a vice president, but when asked at trial if she ever attempted to contact Cousins, plaintiff stated, "I don't even know who he is." Further, McLaughlin testified at length regarding defendant's harassment policy and that new hires are supposed to sign an acknowledgment form. However, defendant never produced any acknowledgment form at trial showing that plaintiff, in fact, received and read the employee handbook.

Regarding vicarious liability, the jury was instructed pursuant to *Radtke* and *Champion v Nation Wide Security, Inc.*, 450 Mich 702; 545 NW2d 596 (1996). The evidence and reasonable inferences from the evidence at trial, taken in a light most favorable to plaintiff, supports the jury's verdict that defendant had adequate notice of the sexual harassment of plaintiff by her supervisor and that defendant failed to rectify the problem, that being Wolshon's conduct of sexually harassing plaintiff. I emphasize that it was for the jury to make credibility determinations, to resolve conflicts in the evidence, to weigh the evidence, to accept or reject any of the evidence, and to draw any reasonable inferences from the evidence that it chose to draw. *Brisboy, supra* at 550; *Johnson v Corbet*, 423 Mich 304, 314; 377 NW2d 713 (1985); *Thomas v*

McGinnis, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). Moreover, neither the trial court nor an appellate court may substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

Accordingly, I would find that there was sufficient evidence from which the jury could conclude that defendant received notice of the supervisor's harassment toward plaintiff and that defendant did not take adequate remedial action to stop the harassment. I would affirm the jury's verdict.

/s/ Kathleen Jansen

¹ *Chambers v Trettco, Inc*, 232 Mich App 560; 591 NW2d 413 (1998).

² See 42 USC 2000e *et seq.*

³ Interestingly, while our Supreme Court stated that we "erroneously failed to apply controlling Michigan legal principles regarding sexual harassment claims brought under Michigan law, and instead applied the federal principles announced in *Faragher* and *Ellerth*," *Chambers, supra*, 463 Mich 318, the Court in *Radtke, supra* at 397, relied exclusively on federal cases, *Katz v Dole*, 709 F2d 251 (CA 4, 1983), and *Henson v Dundee*, 682 F2d 897 (CA 11, 1982), in determining that an employer must have notice of the alleged harassment before being held liable for not implementing action. The United States Supreme Court in *Faragher* and *Ellerth* did not follow the notice principles set forth in *Katz* and *Henson*.